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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. ANDY LEROY FULTON, JR., Defendant and Appellant.	C044174 (Super. Ct. No. CM014366)

By information, defendant, Andy Leroy Fulton, Jr., was charged with felony battery with injury on peace officer G. Kyle (Pen. Code, §§ 242, 243, subd. (c)(1)--count one; all unspecified statutory references are to the Penal Code), misdemeanor battery with injury on peace officer B. Lange (§§ 242, 243, subd. (b)--count two), and misdemeanor delaying or resisting both officers (§ 148, subd. (a)(1)--count three).

A jury acquitted defendant on count one and convicted him of the lesser-included offense of misdemeanor battery on a peace officer. (§§ 242, 243, subd. (b).) The jury acquitted him on

count two and convicted him on count three. Imposition of sentence was suspended and defendant was placed on probation for three years.

On appeal, defendant contends the jury was misinstructed in several respects. Because our de novo review discloses no prejudicial error (*People v. Waidla* (2000) 22 Cal.4th 690, 733), we affirm the judgment.

FACTS AND PROCEEDINGS

On July 21, 2000, Gold Country Casino security personnel encountered defendant and his stepfather, Fidel Molina, at the information desk. Because both men were intoxicated, loud, and boisterous, security personnel asked them to walk to an area away from other customers. They complied and eventually reached the administration portion of the casino. Along the way, defendant stopped and spoke briefly with his father, Andy Fulton, Sr., (Fulton) who was in the casino restaurant. Security personnel told defendant to stay in the administration area, but he said that he would not stay. He walked outside and several security personnel followed.

Outside the administration building, security personnel tried to calm defendant who argued with them and threatened to fight them. At some point a security officer went to get Fulton, Sr., in the restaurant and have him come outside. Defendant did not calm down and continued to argue for approximately 20 minutes.

At about 7:37 p.m., Butte County Sheriff's Deputies Grant Kyle and Bryant Lange arrived in their squad car. They had been dispatched to the casino upon a report that a drunken subject was causing a disturbance. From his car, Deputy Kyle saw defendant throwing up his arms, turning toward security personnel and walking back and forth. It appeared to Kyle that security was trying to direct defendant away from the casino, that he was refusing to leave, and that his arm movements constituted an assault.

It appeared that defendant noticed the deputies. He walked away from the casino and toward Molina's truck in the parking lot. Defendant got into the truck and a security officer saw him reach down between his legs.

The deputies parked, got out of their car and approached defendant in the truck. Deputy Kyle saw defendant reaching under the truck seat, and there was "just no telling" whether he had a weapon within reach. Kyle drew his firearm and ordered defendant to show his hands. Both deputies ordered him to get out of the truck. Defendant refused to comply with either command. Kyle sprayed pepper spray into defendant's eyes and toward his chest. Defendant turned away but still did not show his hands.

Molina stood by the open passenger door and ignored commands to step back so Deputy Lange pulled him away. During this time Molina, who initially had tried to calm defendant down, encouraged him to fight with the officers. Molina also resisted Lange and started swearing at him.

Defendant got out of the truck and started toward Deputy Lange. Deputy Kyle tried to place defendant against a car and handcuff him, but he resisted, turned and tried to face the deputy. Defendant pulled back his hand and struck Kyle in the face, head and jaw. Kyle started to retreat and then hit defendant in the chest in order to drive him away.

Deputy Lange then approached defendant and wrestled him to the ground. Lange climbed onto defendant's back and tried to control him, but defendant continued to resist. He attempted to push himself up off the ground and Deputy Kyle struck defendant's hand with a baton in an attempt to knock his arm out from under him. Lange then handcuffed defendant.

Seeing this, Fulton rushed toward Deputy Kyle and asked him not to hit his son. Kyle ordered Fulton to step back, but Fulton got into a fighting stance. Kyle struck Fulton's arm with a baton, then Fulton kicked Kyle's upper torso, and then Kyle again struck Fulton's hand or arm. Kyle ordered Fulton to the ground and handcuffed him after he complied.

Throughout the encounter, Molina encouraged defendant and Fulton to continue to fight. Deputy Lange ordered Molina to the ground and handcuffed him too, but that did not deter Molina from encouraging defendant to fight.

Deputy Kyle told defendant that he was under arrest for assault on a peace officer. Defendant then pulled his handcuffs under his body and around to his front. Again, he tried to stand up and fight and Kyle became concerned that the handcuffs could be used as a choking device. He struck defendant in an

attempt to distract him and regain compliance. Then Kyle applied pressure to defendant's carotid artery, which caused him to become momentarily unconscious.

Defendant regained consciousness within a matter of seconds and tried to get up yet again. Molina started to roll over on his back and Lange pepper sprayed Molina to discourage him from standing up.

Defendant tried to get back to his feet. Deputy Kyle told him several times not to resist. Kyle delivered "a series of blows" and "literally threw" defendant back down to the ground. After a brief further struggle, defendant stopped and said that he was giving up.

Fulton was the only witness for the defense. He testified that, when he first saw defendant, four or five security guards were escorting him past the restaurant. One security officer told Fulton that defendant was becoming belligerent. Eventually, Fulton followed everyone outside. He tried to calm defendant and Molina, but they would not listen. He saw a deputy hit defendant and strike him with a baton. Fulton yelled that the officers did not need to do that. Fulton then got hit with the baton and "threw a fit." Fulton told Molina to get back, and then an officer told Fulton to get on the ground. Fulton told defendant to be still; he did not encourage defendant to fight. At one point an officer had his knee on defendant's head and at another point an officer hit defendant in the face.

DISCUSSION

I

The Lawfulness of the Officer's Order to Defendant to Show His Hands

Defendant contends his conviction on count one must be reversed because the trial court erroneously instructed the jury that it was lawful for a police officer to order a suspect to show his hands. We do not agree with this contention.

The jury received the following special (non-CALJIC) instruction: "It is lawful for a peace officer upon contact with an individual during the course of an inquiry or investigation to order that such person place his hands in the open and in a position where the peace officer may keep such person's hands under observation. The mere order for the person to place his hands where the peace officer may keep them under observation does not in itself amount to detention."

The only authority cited in support of the special instruction is *In re Frank V.* (1991) 233 Cal.App.3d 1232, which recognized that prior California cases have "allowed officers conducting an investigation to request a suspect to step out of the vehicle *or to keep his hands in sight* for officer safety. [Citations.]" (*Id.* at p. 1238, italics added, citing *People v. Superior Court* (1972) 7 Cal.3d 186, 206, fn. 13; *People v. Maxwell* (1988) 206 Cal.App.3d 1004, 1008; *People v. Padilla* (1982) 132 Cal.App.3d 555, 558.)

In re Frank V. had no occasion to analyze this settled rule of law. The case simply held that "an *order*" to a suspect to "take his hands out of his pockets" does not "automatically transform[] a consensual encounter into a detention." (*In re Frank V., supra*, 233 Cal.App.3d at p. 1239.)

Defendant recognizes the narrowness of *In re Frank V.*'s holding, but he overlooks the authorities cited therein, which have held that *it is lawful* for an officer to tell a suspect to keep his hands in sight.

Thus, defendant's claim that the special instruction "was without support in the law" has no merit. Because the issue of the propriety of the order was one of law rather than fact, it was properly addressed in an instruction and was not an "element" for "the jury's determination."

In passing, we note that in his reply brief, defendant attempts for the first time to distinguish *People v. Padilla, supra,* 132 Cal.App.3d 555 on its facts. His attempt is not persuasive because, whether required or not, the officers in both cases gave reasons why the respective defendant's actions reasonably caused them to fear for their own safety.

II

Lesser Included Offense of Battery

Our conclusion that *it is lawful* for an officer to tell a suspect to keep his hands in sight (*People v. Superior Court, supra,* 7 Cal.3d at p. 206, fn. 13; *People v. Maxwell, supra,* 206 Cal.App.3d at p. 1008; *People v. Padilla, supra,* 132 Cal.App.3d

at p. 558; see part I, *ante*) negates defendant's related contention that count one must be reversed because the trial court failed to instruct the jury sua sponte on simple battery as a lesser included offense of battery upon a peace officer.

A defendant who resists an arrest "commits a public offense; but if the arrest is ultimately determined factually to be unlawful, the defendant can be validly convicted only of simple assault or battery." (*People v. Curtis* (1969) 70 Cal.2d 347, 355-356, disapproved on other grounds, *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222.)

Defendant reasons, "if Deputy Kyle's order that [he] show his hands was not lawful, that is, if Kyle was attempting to make an unlawful arrest or detention, then [defendant] was only guilty of simple battery."

Having rejected the premise that Deputy Kyle's order was unlawful, we also reject the conclusions that the crime was simple battery and that jury instructions on that crime were required sua sponte. (See *People v. Barton* (1995) 12 Cal.4th 186, 195 [no duty to instruct on lesser included offenses where there is no evidence that the offense was less than that charged].) In so holding, we necessarily reject the People's concession that omission of a simple battery instruction was error.

III

Incomplete Instructions on Self-defense

Defendant contends his conviction on count one must be reversed because the trial court failed to give the jury complete instructions on self-defense. The trial court used CALJIC Nos. 5.30,[1] 9.26,[2] and 9.28[3] to instruct the jury on the general issue of the use of force in an officer/detainee confrontation. Defendant claims CALJIC Nos. 5.50 (Self-defense

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[1] CALJIC No. 5.30 provided: "It is lawful for a person who is being assaulted to defend himself from attack if as a reasonable person he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so that person may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person in same or similar circumstances to be necessary to prevent injury which appears to be imminent."

[2] CALJIC No. 9.26 provided in relevant part: "[I]f you find that the peace officer used unreasonable or excessive force in making arrest or detention, the person being arrested or detained has no duty to refrain from using reasonable force to defend himself against use of the excessive force."

[3] CALJIC No. 9.28 provided: "A peace officer is not permitted to use unreasonable or excessive force in making or attempting to make an arrest or in detaining or attempting to detain a person for questioning. [¶] If an officer does use unreasonable force or excessive force in making or attempting to make an arrest or attempting to detain a person for questioning, the person being arrested or detained may lawfully use reasonable force to protect himself. Thus if you found [*sic*] that the officer used unreasonable or excessive force in making or attempting to make arrest or making or attempting to make the detention in question and the defendant used only reasonable force to protect himself, the defendant is not guilty of the crimes charged or of any lesser included offense."

--Need Not Retreat) and 5.51 (Actual Danger Not Necessary) should have been given sua sponte. We disagree.

Initially, we note that, in presenting his argument relating to self-defense instructions, defendant errs by overlooking the principle that a defendant who, through his own wrongful conduct, created the circumstances under which he has been attacked cannot invoke the doctrine of self-defense. (See *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.) Defendant initiated and engaged in a struggle to resist the police who, acting lawfully, were attempting to investigate an incident caused by drunkenness and belligerence. Defendant created the circumstances that gave rise to the police response and could have avoided the physicality of that response simply by complying with their lawful orders. By his wrongful conduct, defendant created the circumstances that led to the officers' need to display their weapons and, thereafter, struggle with him in placing him under arrest. In short, defendant probably received more than he was due when the court agreed to give CALJIC No. 5.30.

In any event, "[t]he trial court's duty to instruct on general principles of law and defenses not inconsistent with the defendant's theory of the case arises only when there is substantial evidence to support giving such an instruction. [Citation.] Substantial evidence is evidence of reasonable, credible value." (*People v. Crew* (2003) 31 Cal.4th 822, 835.)

CALJIC No. 5.50 states: "A person threatened with an attack that justifies the exercise of the right of self-defense

need not retreat. In the exercise of [his][her] right of self-defense a person may stand [his][her] ground and defend [himself][herself] by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue [his][her] assailant until [he][she] has secured [himself][herself] from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene."

In this matter, there was insufficient evidence to require CALJIC No. 5.50. Officers confronted defendant while he was in the cab of Molina's truck. He initially refused an order to show his hands and get out of the truck. After a substantial struggle, he was restrained and handcuffed. His further efforts to continue the struggle were met with various forms of preventive resistance. There is no evidence that he was, at any time, threatened with an attack that justified the exercise of a right of self-defense. While ultimately he was "attacked," the genesis of that attack was his own wrongful conduct and, thus, the attack did not give rise to a right of self-defense. Under these circumstances, there was no need to explain to the jury that one who is attacked need not retreat. A trial court is not required to instruct the jury on defense theories for which there is no substantial evidence.

CALJIC No. 5.51 states: "Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of

danger which arouses in [his][her] mind, as a reasonable person, an actual belief and fear that [he][she] is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing [himself][herself] in like danger, and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent."

As with CALJIC No. 5.50, there was insufficient evidence to support an instruction on the concept of apparent danger. A reasonable person in this situation would have complied with the officers' orders and, by doing so, would not have had cause to believe himself in danger at all. CALJIC No. 5.51 must be considered in the context of the law of self-defense and defendant cannot claim that he reasonably thought he was in danger and attempt to use that to his advantage when the appearance of danger would not have arisen or continued if he had done what he was told to do. He cannot create an appearance of danger and then claim he was justified in reacting to it. The legal principles addressed in CALJIC No. 5.51 do not apply under the facts of this case and there was no duty to give an inapplicable instruction. (*People v. Crew, supra,* 31 Cal.4th at p. 835.)

Defendant contends the trial court erred by failing to instruct the jury sua sponte that the prosecution bore the burden of proving that he did not act in self-defense. We have

previously rejected this contention. (*People v. Allen* (1978) 76 Cal.App.3d 748, 752-753.) Nothing in our more recent opinion in *People v. Watie* (2002) 100 Cal.App.4th 866 compels a different result. In *Watie*, we assumed "[f]or the sake of our analysis" that the last paragraph of CALJIC No. 9.03.3 should have been given; however, we did not decide that issue or indicate any disagreement with *Allen*. (*Watie, supra*, at p. 880.)

Alternatively, any error could not have been prejudicial in light of the other instructions on the burden of proof. (CALJIC Nos. 2.01, 2.90, 9.29; *People v. Breverman* (1998) 19 Cal.4th 142, 177; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant theorized that he acted in self-defense *because the officers were not engaged in the performance of their duties*. CALJIC No. 9.29 told the jury that, if it had a reasonable doubt that the officers were engaged in the performance of their duties, it "must find the defendant not guilty." An instruction that the prosecution had the burden to negate self-defense would have done little but invoke this very principle. Omission of the essentially duplicative instruction was not prejudicial.

Defendant contends the trial court erred by failing to instruct sua sponte that "an offensive touching, although it inflicts no bodily harm, may nonetheless constitute a battery, which the victim is privileged to resist with such force as is reasonable under the circumstances." (*People v. Myers* (1998) 61 Cal.App.4th 328, 335.) *Myers* held that CALJIC No. 5.30, which was given in this case, applies by its terms to self-defense against bodily injury and is inadequate where there is no such

injury but there is conduct constituting a battery. (*Id.* at pp. 334-335.)

Defendant claims the *Myers* instruction was supported by the applications of pepper spray and the attempts to handcuff him, which "were not blows, but could have been found to have been an offensive touching." However, no substantial evidence suggested that defendant *had* a right of self-defense against the pepper spray and the handcuffing, even though he had *no* right of self-defense against the acts that caused bodily injury. Thus, there was no evidentiary basis upon which to reject the CALJIC No. 5.30 defense *and* accept a *Myers* defense. The trial court did not err by failing to give a *Myers* instruction on its own motion. (*People v. Crew, supra,* 31 Cal.4th at p. 835.)

IV

CALJIC No. 9.26

Defendant contends the trial court erred by instructing the jury pursuant to CALJIC No. 9.26, that it is "the duty of the person to refrain from using force or any weapon to resist the . . . detention *unless unreasonable or excessive force is being used* to make the . . . detention." (Italics added.) He claims the instruction is erroneous because a person has "a right to resist an unlawful detention, *even if it is not accompanied by excessive force*." (Italics added.) We disagree.

First, we have already rejected defendant's argument that Deputy Kyle's order to display his hands rendered the detention unlawful. (See part I, *ante*.) His present argument does not

assert any other claim of illegality. Because the jury had no basis to find an unlawful detention, an instruction erroneously limiting the right to resist such a detention could not have been prejudicial.

In any event, defendant's argument has no merit. He relies on *People v. Jones* (1970) 8 Cal.App.3d 710, which held "an officer engaged in an unlawful detention for questioning may be resisted by means of reasonable force." (*Id.* at p. 717.) However, in *Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 326-333 the court rejected *Jones* as indefensible and dangerous. *Evans* explained: "it is highly unlikely that in a day when police are armed with lethal weapons and scientific communication and detection devices, a defendant using reasonable force can effectively deter an arrest. [Citation.] Similarly, we conclude that in a detention the same likelihood prevails and that ' . . . self-help as a practical remedy is anachronistic.' [Citation.]" (*Evans, supra,* at p. 332.) The persuasive force of *Evans*'s reasoning has only grown in the 10 years since it was decided, as police weapons have become even more lethal and sophisticated. The jury was properly instructed with CALJIC No. 9.26.

V

Unanimity Instruction

Defendant contends his conviction on count three must be reversed because the jury was not instructed that it had to "unanimously agree which officer was the victim." We disagree.

The information alleged that defendant resisted, delayed, and obstructed both officers. (See *People v. White* (1980) 101 Cal.App.3d 161, 169, fn, 3 [recommending such allegation].) However, the verdict form did not refer to a particular officer or state that defendant was guilty as charged in the information.

The jury was instructed with CALJIC No. 17.01 as follows: "The defendant is accused of having committed the crime of battery upon and resisting, delaying and obstructing peace officers in counts one, two and three. The prosecution has introduced evidence for purpose [*sic*] of showing that there's more than one act or omission upon which a conviction may be based. [¶] Defendant may be found guilty if proof shows beyond a reasonable doubt that he committed any one of the acts or omissions. However, in order to return a verdict of guilty all jurors must agree that he committed the same act or omission or act [*sic*] or omissions. It is not necessary that a particular act or omission agreed upon be stated in your verdict."

CALJIC No. 16.102 (1998 rev.) as given to the jury effectively defined the act or omission required for count three as "a person willfully resisted, delayed or obstructed a peace officer." That instruction said: "Defendant is accused in count three of having violated Penal Code Section 148(a)(1) a misdemeanor. Every person who willfully resists, delays or obstructs any person, [*sic*] peace officer from attempting to discharge any duty of his office or employment and who knows or reasonably should know that the other person is a peace officer

engaged in the performance of his duties is guilty of the violation of Penal Code Section 148(a)(1) a misdemeanor. [¶] In order to prove this crime each of the following elements must be proved. One, a person willfully resisted, delayed or obstructed a peace officer. Two, at that time the peace officer was engaged in the performance of his duties and three, the person who willfully resisted, delayed or obstructed, knew or reasonably should have known that (a), the other person was a peace officer, and (b) was engaged in the performance of his duties."

In order for the jurors to convict defendant on count three, they would need to agree that he committed the same act or omission, i.e., that he "willfully resisted, delayed or obstructed" a particular "peace officer" or both officers simultaneously. Defendant's argument that the jury could have interpreted the "act" narrowly as, for example, his refusal to step out of the truck, "without agreeing which officer's order was disobeyed," overlooks CALJIC No. 16.102's requirement that the act be one of resistance to a peace officer. In defendant's example, the jurors would have to agree that the refusal to step out of the truck constituted an act of resistance to one or both peace officers. There was no instructional error.

Defendant's reliance on *People v. White, supra,* 101 Cal.App.3d at age 169, footnote 3, is misplaced because there is no indication that the jury therein was given a unanimity instruction such as CALJIC No. 17.01.

VI

Cumulative Error

Defendant contends the cumulative effect of the foregoing errors compels reversal of the judgment. Because we have rejected each of those claims, we reject this claim as well.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

DAVIS, Acting P.J.

ROBIE, J.